No. 78-1923

# In The Supreme Court of the United States

OCTOBER TERM, 1978

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LOUIS LEONARD KITCHIN, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# INDEX



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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a-1 to a-9) is reported at 592 F. 2d 900. The opinion of the district court (Pet. App. a-9 to a-26) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 9, 1979. A petition for rehearing was denied on May 7, 1979. The petition for a writ of certiorari was

filed on June 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTION PRESENTED

Whether the trial court abused its discretion in granting the government's motion to disqualify petitioner's counsel.

## STATEMENT

On May 9, 1978, an indictment charging petitioner with bribery of a public official, in violation of 18 U.S.C. 201(b), and obstruction of justice, in violation of 18 U.S.C. 1503, was returned in the United States District Court for the Northern District of Georgia. Petitioner entered a plea of not guilty (6/9/78 Tr. 6). On May 26, 1978, Taylor Jones notified the district court that he would be petitioner's counsel. The government subsequently moved to disqualify Jones from representing petitioner. Following an evidentiary hearing, the district court granted the government's motion and entered an order of disqualification. Petitioner appealed, and the court of appeals affirmed (Pet. App. a-1 to a-9).

1. The dispute in this case arises from the fact that Jones has employed in his law firm Steven Ludwick, a former Assistant United States Attorney and Chief of the Criminal Division of the United States Attorney's Office, who was responsible while in the government for reviewing the case against petitioner.

In 1975, a grand jury in the Northern District of Georgia returned an indictment against Dr. Marshall Cohen on charges relating to the illegal dispensing of controlled substances. Cohen filed a pretrial motion in which he alleged prosecutorial misconduct and sought dismissal of the indictment or, in the alternative, disqualification of the United States Attorney's Office for the Northern District of Georgia from prosecution of



the case. The prosecutorial misconduct motion was founded upon allegations that petitioner, who was at the time the Administrative Assistant to the Member of Congress from the Fifth District of Georgia (Pet. 6-7), had attempted to exert improper influence on John Stokes, then the United States Attorney, to dismiss Cohen's indictment. Cohen therefore maintained that Stokes' office could no longer objectively conduct plea negotiations with Cohen (6/12/78 Tr. 61-62). Petitioner's alleged efforts to influence Stokes constitute the factual basis for the present indictment against petitioner.

The district court in Cohen's case ordered an *in camera* hearing on Cohen's allegations of prosecutorial misconduct (6/9/78 Tr. 14-15). Petitioner was a witness at that hearing (*ibid.*). Steven Ludwick, then an Assistant United States Attorney, represented the government (6/12/78 Tr. 11). In preparing for the hearing, Ludwick discussed the case with the investigating FBI special agent and reviewed all FBI investigative reports relating to petitioner's alleged attempt to influence the government's handling of Cohen's case (*id.* at 17, 38-39, 62).

2. Beginning in January 1977, Ludwick, then Chief of the Criminal Division of the United States Attorney's Office, personally supervised that office's review of the advisability of prosecuting petitioner in the instant case (*id.* at 37). Ludwick assigned the case to William Tetrick, another Assistant United States Attorney, for his recommendations. Tetrick recommended to Ludwick that the prosecution be handled by Department of Justice attorneys in Washington and that all government attorneys from the Northern District of Georgia recuse themselves (*id.* at 12-13). Tetrick's memorandum also outlined the evidence supporting the prosecution of petitioner and discussed the strengths and weaknesses of the government's case (*id.* at 13). Ludwick assigned the case to Richard Wile, another Assistant United

States Attorney, for a second opinion on the merits of a prosecution against petitioner (6/9/78 Tr. 22). Although Ludwick expressed his view to Wile that there "was [not] much to [petitioner's] case" (*id.* at 26–27; 6/12/78 Tr. 15–16), Wile, like Tetrick, recommended that the United States Attorney's Office refrain from further involvement because of potential conflicts of interest (6/9/78 Tr. 23, 30–31).[1]

In May 1978, the indictment against petitioner was returned. Petitioner's counsel at the arraignment was the same attorney who had represented petitioner at the *in camera* evidentiary hearing in Cohen's case (*id.* at 14–15). Petitioner discharged that attorney on May 22, 1978, and subsequently retained Jones as his counsel (*id.* at 11–12).

In February 1978, some three months prior to the return of the indictment, Ludwick resigned his position as an Assistant United States Attorney and became an associate in Jones' four-person law firm (Pet. App. a–12 to a–13).

3. In light of Ludwick's affiliation with Jones, the government filed a motion to disqualify Jones when it learned that he was to represent petitioner. At an evidentiary hearing before a United States Magistrate on the government's motion to disqualify, Ludwick, who had been Chief of the Criminal Division of the United States Attorney's Office, was described as the "right arm" of Stokes, the United States Attorney whom petitioner is alleged to have approached in connection with the Cohen case (6/12/78 Tr. 19). Both Assistant United States Attorneys whom Ludwick had requested to review the materials pertaining to

[1] Subsequently, petitioner's case was forwarded to the Department of Justice. Following the change in Administrations and Stokes' resignation as United States Attorney, the file was returned by the Department to the United States Attorney's Office for a final determination as to whether prosecution of petitioner's case should proceed (6/9/78 Tr. 38–40).



petitioner's alleged bribery and obstruction of justice felt some discomfort about the office's handling of the case and their being asked to review it, and they discussed the possibility that someone in the office, perhaps Ludwick, might destroy a memorandum one of them had prepared about the evidence against petitioner (6/9/78 Tr. 26–27, 29; 6/12/78 Tr. 15, 19–20, 36). There was also testimony that both Assistants believed that Stokes would not be pleased about a recommendation that the case be transferred from the United States Attorney's Office to the Criminal Division of the Justice Department in Washington and that Ludwick had specifically reminded one of the Assistants that his annual job performance review would be conducted in the near future (6/9/78 Tr. 24–25; 6/12/78 Tr. 14, 17–18, 36–37). Ludwick was responsible for reviewing the salaries and raises for personnel in the office at the time (6/12/78 Tr. 37).

In response to a question whether he believed Ludwick had engaged in unethical conduct in connection with the office's handling of the matter pertaining to petitioner, one of the two Assistants stated:

> I don't believe I could point up anything that I would say was Steve Ludwick's fault or his own doing which would be in that category in this case. You must remember, Mr. Jones, that Steve was John Stokes' right arm, and Steve worked for him directly, and very often Steve was in a position of doing things—taking actions, giving orders—which weren't his own doings, but were simply carrying out the instructions of his superior.

(6/12/78 Tr. 19). The other Assistant testified that he thought it was unethical for Ludwick to have asked anyone in the United States Attorney's Office to pass on the prosecutive merits of the case (6/9/78 Tr. 30). Following the evidentiary hearing, the district court granted the government's motion to disqualify (Pet. App. a–9 to a–26). The court of appeals affirmed, en-

dorsing the opinion of the district court that, in the present case, "the public's interest in the integrity of the judicial process and in a fair but vigorous prosecution of one accused of attempting to disrupt enforcement of the criminal laws outweighed [petitioner's] right to counsel of his choice * * *" (Pet. App. a-2).

## ARGUMENT

Petitioner contends (Pet. 15, 37) that the trial court abused its discretion in granting the government's motion to disqualify Taylor Jones from serving as defense counsel. However, disqualification was clearly appropriate here.

Rule 71.54 of the Local Rules of the United States District Court for the Northern District of Georgia provides that attorneys practicing before the court are subject to the canons of ethics of the American Bar Association. Canon 9 of the ABA Code of Professional Responsibility states that an attorney should "avoid the appearance of impropriety." One of the disciplinary rules under that canon, DR 9-101(B), provides that a lawyer "shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." It is clear, given Ludwick's review of materials pertaining to allegations of obstruction of justice by petitioner and his discussions with a number of attorneys in the United States Attorney's Office, that he had "substantial responsibility" for matters pertaining to petitioner when they were at a preliminary stage. It is therefore apparent—and petitioner concedes (Pet. 15)—that Ludwick is personally barred in this case.

Disciplinary Rule 5-105(D) of the Code of Professional Responsibility provides:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.



Thus, on the face of the Code of Professional Responsibility, the entire law firm that a former government attorney joins is disqualified from handling a case in which the former government attorney is personally barred because of his participation in it while in government. This is consistent with the long-recognized principle that disqualification of one lawyer in an organization generally constitutes grounds for disqualification of all affiliated lawyers. American Bar Association, Committee on Professional Ethics, Formal Opinion 342, 62 A.B.A.J. 517 n.2 (1976), and cases cited. This principle is based upon the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners freely to exchange information among themselves about pending cases (*ibid.*).

However, in Formal Opinion 342, *supra*, the ABA concluded that this imputed disqualification of a lawyer's partners and associates may properly be waived in the case of a former government lawyer if the government agency concerned is satisfied that the former government attorney who is personally barred will be screened from any participation in the case and from sharing in any fees attributable to it, "*and that there is no appearance of significant impropriety affecting the interests of the government.*" 62 A.B.A.J. at 521 (emphasis added). This provision for government waiver, in appropriate circumstances, of the imputed disqualification of partners and associates of a former government lawyer who is personally barred represents a reasonable accommodation between the need to protect the integrity of government processes and the countervailing need to ensure that attorneys will not be unduly deterred from entering government service by

the prospect that their future employment prospects will be substantially impaired. *Id.* at 520–521.

The Department of Justice has followed the waiver approach recommended by the ABA. When it appears that a former Department attorney is adequately screened from participation in a case and will not share in fees attributable to it, and if there is no other significant appearance of impropriety in the particular instance, the Department has consented to the former Department attorney's law firm's participation in the case.

Thus, in the typical case, the government would have no objection to the partner or associate of a former Assistant United States Attorney's participating in a matter in which the latter was personally barred, if the firm's screening measures were adequate. But this is not the typical case. Petitioner is charged with bribery and obstruction of justice in the very office in which Ludwick was employed. Ludwick was the "right arm" of the United States Attorney petitioner is alleged to have approached. Ludwick reviewed the office files pertaining to the charges and served as an intermediary between the United States Attorney and two Assistant United States Attorneys who reviewed these charges to determine their prosecutive merit and to determine whether a conflicit of interest would be presented if any attorney in the United States Attorney's Office handled the case. Testimony at the evidentiary hearing in this case, in fact, can be read to call into question the propriety of Ludwick's conduct, while he was with the government, in connection with this case.

This case therefore falls into that narrow category of cases in which it is inappropriate for the government to waive the imputed disqualification of the former government lawyer's law firm because of the "appearance of significant impropriety affecting the interests of the government." ABA Formal Opinion 342, *supra*, 62



A.B.A.J. at 521. For, as the district court observed (Pet. App. a–24 to a–25), "the nature of the charges leveled against the [petitioner] go to the very heart of the integrity of the prosecutor's office, particularly the idea that all persons are accountable for their criminal conduct regardless of wealth or politial influence. * * * Consequently, society's interest in fair but unimpeded prosecution of the criminal law outweighs the defendant's right to counsel of his choice under the circumstances of this case."

Therefore, under generally accepted ethical principles embodied in the ABA Code of Professional Responsibility, ABA Formal Opinion 342 interpreting the Code, and the local rules of the district court incorporating it, the government was fully entitled to withhold its consent to Taylor's representation of petitioner in this case, and the court was fully justified in granting the government's motion to disqualify.

Whether an attorney in a given case should be disqualified is a question committed to the sound discretion of the trial court. *United States* v. *Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976); *Lefrak* v. *Arabian American Oil Co.*, 527 F. 2d 1136, 1140–1141 (2d Cir. 1975). At the very least, the district court did not abuse its discretion in granting the government's motion to disqualify.

In contrast to the significant likelihood of public suspicion, petitioner advances less substantial interests that would be served by Jones' continued representation. Although petitioner relies (Pet. 34) upon the asserted right of a defendant to counsel of his choice, he concedes (Pet. 22), as he must, that this right is not absolute. See *United States* v. *Armedo-Sarmiento*, 524 F. 2d 591 (2d Cir. 1975). Furthermore, petitioner's contention that Jones' services are indispensable to his defense is undermined by the fact that Jones did not represent him immediately following his indictment.

Petitioner also suggests (Pet. 34–35) that the decision below infringes upon Jones' right to freely practice his profession. Jones, he suggests (Pet. 35), has not been disqualified as a result of his own activities, but rather as a result of "the coincidence of his employment of Mr. Ludwick." The hiring of Ludwick, however, was a decision within Jones' control, and certainly he should have been aware that hiring a former Assistant United States Attorney could restrict the firm's representation of clients in matters that were handled by that former assistant. See ABA Code of Professional Responsibility, DR 9–101(B), DR 5–105 (D).

Finally, petitioner contends (Pet. 35–36) that the rulings of the courts below will have the effect of deterring persons from accepting government employment, because private firms would be unwilling to assume an economic risk by hiring former government employees. But, as noted above, disqualification was in order here because of the highly unusual circumstances of this case. Such isolated and entirely appropriate instances of disqualification are not likely to deter attorneys from entering public service.



## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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